BRIEF IN SUPPORT OF FOREGOING PETITION FOR A WRIT OF CERTIORARI.

A.

Opinions Below.

The opinion of the District Court (R. 27-44) sustaining the demurrer interposed by petitioners to the original condemnation petition, with leave to respondent to plead further, is reported in 33 F. Supp. 756. The opinion of the District Court upon the demurrer to the petition as amended (R. 52-64), pursuant to which demurrer the final order dismissing the petition as amended was entered, is reported in 39 F. Supp. 540. The opinion of the Circuit Court of Appeals (R. 68-80) is not yet reported.

B.

Jurisdiction.

A statement particularly disclosing the basis upon which it is contended that this Court has jurisdiction to review the Order of the Circuit Court of Appeals is set forth in the petition at page 8, *supra.*

C.

Statement of the Case.

A Statement of the Case has been given under heading "A" in the petition for certiorari (pp. 2-8, *supra*) and to avoid duplication is not repeated.

D.

Specification of Errors to be Urged.

The court below erred:

1. In holding that Executive Order 7183A, in authorizing the construction of the so-called Bluestone Reservoir Project "in accordance with the report of the Chief of Engineers to the Congress *and* the plans and specifications

submitted therewith", did not adopt a condition imposed by the Chief of Engineers upon his recommendation of the project (H. D. 91, p. 5), viz., that said project should be constructed only "*provided that* definite agreement is entered into before construction is begun for the disposal of the power at prices and under conditions that in the opinion of the Secretary of War will fully protect the public interest".

2. In holding that the aforesaid condition was not adopted by the Congress through its express approval and adoption of "the provisions of Executive Order Numbered 7183A" in the Act of June 28, 1938.

3. In holding that, even if the Congress adopted the aforesaid condition by the Act of June 28, 1938, the allegedly unconditional authorization of the project in the Act of June 22, 1936, would nevertheless, in the absence of express language of revocation in the Act of June 28, 1938, remain in full force and effect.

4. In holding that the Congress had constitutional authority under the facts and circumstances of this case to authorize the construction of the power project included in the Bluestone Statutory Scheme for the creation of water power for sale to the public.

5. In holding that the Congress has constitutional authority to authorize a power project to create water power for sale to the public in order to obtain income with which to defray the cost of, or to make "economically feasible," some constitutional project.

6. In reversing the final order of the District Court.

ARGUMENT.

I.

The condition imposed by the Chief of Engineers upon his recommendation for the construction of the project was adopted by the Congress and is a condition precedent to the existence of any authority in the federal officers to condemn.

The Act of June 28, 1938, expressly approved, and thereby adopted, "the provisions of Executive Order Numbered 7183A" (p. 6, *supra*). The plain significance and meaning of the *proviso*, contained in the Act of 1938 concerning the Bluestone Reservoir, is that, *whatever* may theretofore have been done or said—in the Act of 1936, in preceding portions of the Act of 1938 or elsewhere—, the authorization of the project is completely and solely in accordance with the expressly approved provisions of the Executive Order. The Executive Order only authorized and directed "the construction of said Bluestone Reservoir Project *in accordance with the report of the Chief of Engineers* to the Congress *and* the plans and specifications submitted therewith" (R. 72). The recommendation in the report of the Chief of Engineers incorporated as an integral part thereof a specific condition in the absence of which the construction of the project was not recommended at all. The Executive Order thus plainly imposed two limitations upon the authority granted to the federal officers. To be within its scope, any action pursuant to that authority must be not only in accordance with the approved plans and specifications but also in accordance with the report of the Chief of Engineers.

The court below apparently reasoned that, although one of the limitations imposed upon the authority to construct

the project was that it should be constructed "in accordance with the report of the Chief of Engineers", that limitation might be disregarded upon the theory that the last sentence of the Executive Order, making available for acquisition of lands part of the sum alloted to the project (the total allotment being only 1/13th of its estimated cost), was inconsistent with the foregoing proviso in the express language of authorization, and that therefore the last sentence should be regarded as controlling (R. 73). This was erroneous. Did such inconsistency exist, plainly the language which would control as to the terms and conditions of the authorization would be that which deals specifically with the authorization of the project rather than the language which deals with the entirely different and collateral subject of directions for expenditure of the inadequate funds alloted. *United States* v. *Jackson* (C. C. A. 9) 143 Fed. 783, 787; Brewer, J. in *Long* v. *Culp,* 14 Kansas 412, 414.

However, no such inconsistency existed or exists; for the Secretary of War could readily before acquiring the lands enter into definite agreement for sale of the power. It may also be noted that the phrase, "in anticipation of their [the lands'] use for such project", obviously had reference to the fact that the actual use of the lands for the declared purposes would in any event have to await the provision of further funds.

Plainly, any attempt of the federal officers to condemn lands for the construction of some project which would not be in accordance with the approved plans and specifications, would have been in excess of their authority. *Ryan* v. *C. B. & Q. R. R.,* (C. C. A. 7) 59 F. (2d) 137, 143. It is equally clear that any attempt of the federal officers to proceed with the construction of the project without complying with any material condition imposed by the Chief

of Engineers upon his recommendation, is likewise in excess of the authority granted.

There could be no purpose in using the words "in accordance with the report of the Chief of Engineers to the Congress" (words approved by the Congress by its adoption of the provisions of the Executive Order) except to impose, upon the authority granted to the federal officers by the Executive Order, the condition specified in that report. Any other construction would ignore and treat as a nullity the words "in accordance with the report of the Chief of Engineers to the Congress", which is precisely what the lower court did.* But that manifestly is in violation of every rule for the construction of statutes and other written instruments and the conclusion of the lower court seems plainly in conflict with the decision of the Seventh Circuit Court of Appeals in *Ryan* v. *C. B. & Q. R. R., supra.* Indeed, the reasoning of the lower court seems to be that, in the absence of an express statement to the contrary, the unqualified adoption of a document, plan or instrument containing conditions, is a rejection of the conditions. Obviously the contrary is true.

Where the Congress desires to authorize a project without adopting any condition imposed by the Chief of Engineers upon his recommendation in the pertinent report, the authorization is "in accordance with the plans and specifications submitted" without further reference to such report of the Chief of Engineers and without requirement that the federal officers shall proceed in accordance with such report as distinguished from the approved plans and specifications. Where, however, the Congressional authorization is *further* limited to the construction of a project

* In so doing, the lower court on this point completely misstates (R. 75) ~~Appellees'~~ Petitioners' position, which was precisely the same in the lower court as stated in this brief.

"in accordance with the report of the Chief of Engineers", the authorization must be held to adopt any substantial condition imposed upon the recommendation of the project by the Chief of Engineers.

Whether under such an authorization the federal officers must comply with all, none, or only part of the conditions imposed by the Chief of Engineers upon his recommendation for the construction of a project by the report in accordance with which alone the federal officers are authorized to construct the project, is a highly important question of federal law which should be decided by this Court, if it has not already been decided in *United States* v. *Arizona*, 295 U. S. 174, adversely to the decision of the lower court.

In the instant case, the conclusion, that the condition incorporated in the Report of the Chief of Engineers was imposed upon the authority granted to the federal officers, is supported by another compelling consideration. The alleged authority for the issuance of the Executive Order was the National Industrial Recovery Act. Section 202 of that Act provided that no river or harbor improvement should be carried out thereunder unless the project had been adopted by the Congress or recommended to the Congress by the Chief of Engineers. The President's authority to authorize the construction of the project under the Recovery Act thus rested solely upon the recommendation of the Chief of Engineers to the Congress. *United States* v. *Arizona*, 295 U. S. 174. But without the performance of the condition precedent, the construction of the project was not recommended at all by the Chief of Engineers.

The lower court in effect held that, the Chief of Engineers having recommended that the project be constructed only in the event of the occurrence or performance of an express condition, the President, relying upon such recom-

mendation as the foundation for his statutory authority (Sec. 202, Recovery Act) in the premises, could entirely disregard a *sine qua non* of the recommendation and authorize the project upon terms under which the project had never been recommended at all, but had in effect been disapproved, by the Chief of Engineers. This amounts to contending that the President could authorize a project which had never been recommended by the Chief of Engineers, a contention which is plainly untenable. Where the President undertook to authorize the carrying out of a river or harbor project (not theretofore adopted by the Congress), under the authority vested in him under the Recovery Act, he could no more disregard the terms and conditions of the recommendation of the Chief of Engineers for construction of such project than he could authorize the carrying out of a project theretofore adopted by the Congress in disregard of the terms and conditions imposed upon its construction by the Congress. No other conclusion would be consistent with the decision of this Court in *United States* v. *Arizona*, 295 U. S. 174, 192.

The court below, erroneously holding that the Act of June 22, 1936 gave the unconditional approval of Congress to the project, further held that this supposedly unconditional approval brought the project within the pertinent language of Section 202 of the Recovery Act and thereby supported the lower court's interpretation of the language of the Executive Order as not adopting the condition. However, as the lower court held in the earlier case, 91 F. (2d) 611, 614, Congressional approval by the Act of 1936 was at most by way of ratification of the Executive Order —a ratification which necessarily carried with it all the conditions therein contained. (See pp. 5-6, *supra*.) But in any event, the Act of 1936 is wholly irrelevant to the

proper interpretation of the Executive Order. Even if unconditional, *a subsequent* authorization by Congress could hardly furnish any support for disregarding the plain language in the *prior* Executive Order, or for holding that therefore such plain language should be construed differently than would otherwise be the case.

The lower court, having erroneously held that the Act of June 22, 1936 had unconditionally approved the project, further held that in the absence of express words of revocation in the Act of 1938, the supposedly unconditional approval of the project by the Act of 1936 was not affected by the subsequent Act. (R. 74.) This discussion of the Act of 1936 is both irrelevant and erroneous. The lands were not acquired nor the project constructed prior to the Act of 1938. If the Act of 1936 did not approve the Executive Order (which necessarily adopted the condition), it is to that extent plainly in conflict with the Act of 1938, which expressly adopts the provisions of the Executive Order. Upon that hypothesis, the Act of 1938 plainly constitutes an implied repeal of the Act of 1936 to the extent of the conflict. *Posadas* v. *National City Bank*, 296 U. S. 497, 503; *United States* v. *Tynen*, 11 Wall. 88, 92; *Fiske* v. *Henarie*, 142 U. S. 459, 467; *District of Columbia* v. *Hutton*, 143 U. S. 18, 26-7.

That the Congress intended to adopt and did adopt the condition is further shown by the legislative history of the Flood Control Act of August 18, 1941. The Congress declined to accede to a request of the Department of Justice that there be inserted in the Bill an amendment which would authorize the acquisition of the lands for the Bluestone Reservoir Project *"without first entering into the definite agreement for the disposal of the power"*. (Hearings before Sub-committee on Flood Control of Senate

Commerce Committee on H. R. 4911, 77th Congress, 1st Session, 43-4; Act of Congress of August 18, 1941.)*

If, as we have shown, the condition was adopted by the Congress, the federal officers, as was substantially conceded below by respondent, are without authority to condemn until the condition is satisfied. The District Court held correctly "that the condemnation of the lands is the first step in the construction of the power dam" (R. 63). *Pittsburgh C. & T. R. Co.* v. *Tod,* 72 Ohio St. 156, 74 N. E. 172; *In re Rochester Electric Ry. Co.,* 123 N. Y. 351, 25 N. E. 381. Indeed, the President expressly so construed the language. Omitting immaterial words, the pertinent provisions of the Executive Order read:

> "I hereby allocate * * * $1,000,000 *for the construction* of the said Bluestone Reservoir Project * * *. Of *the amount* above allocated the sum of *$800,000 shall be available for the acquisition* by purchase, *condemnation,* or otherwise, of lands * * *" (R. 72-3).

However, if the requirement, that a definite agreement for the sale of the power be executed before construction is begun, were construed to be a condition precedent only to the building of the project on the lands, or, in other words, to the use of the land for the authorized purposes, the federal officers would still be without authority to condemn until the condition had been satisfied. Whenever authority to construct, or in other words to carry out, a project depends upon a condition which has not yet occurred or

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* The requested amendment read:

> "That the Secretary of War is herein authorized and directed to proceed with the acquisition of lands for, and the construction of, the Bluestone Reservoir project heretofore authorized by the act of June 22, 1936, 49 Statutes, 1570-1586, and June 28, 1938, 52 Statutes, 1215-1217, *without first entering into the definite agreement for the disposal of the power.*"

which has not yet been performed, there is no authority to condemn lands of a private owner for use in the construction of the project. *Minnesota Canal & Power Co.* v. *Pratt,* 101 Minn. 197, 112 N. W. 395, 403-4; *City of New Lisbon* v. *Harebo, et al.,* 224 Wis. 66, 271 N. W. 659, 662-3; *Wisconsin Water Co.* v. *Winans, et al.,* 85 Wis. 26, 54 N. W. 1003, 1007; *In re Rochester Elec. Ry. Co.,* 123 N. Y. 351, 25 N. E. 381, 382-3; *Department of Public Works & Buildings* v. *Engel,* 315 Ill. 577, 146 N. E. 521, 524; *Winter* v. *Telephone Co.,* 51 N. J. Law 83, 16 Atl. 188.

II.

Respondent is without constitutional authority to authorize the construction and operation of the power project included in the Statutory Scheme known as the Bluestone Reservoir Project.

Where water power is created by the Federal Government, not for federal use but for sale to the public, the constitutional question in each case is whether the water power is created as the incidental result of the construction and operation of structures which have a real adaptedness and *bona fide* and substantial relation to the accomplishment of some constitutional function.

In *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, this Court said:

> "* * * And the Government rightly conceded at the bar, in substance, that it was without constitutional authority to acquire or dispose of such energy except as it comes into being in *the operation of works constructed in the exercise of some power delegated to the United States*" (loc. cit. 340).*

* The question of whether and under what circumstances the United States may constitutionally create raw water power (i.e. the mechanical energy created by impounded water) is not to be

That the decision of the lower court upon this point rests upon a misconstruction and misapplication of the decision of this Court in *Oklahoma* v. *Atkinson Co., supra,* and is in conflict with the decisions of this Court in the *Atkinson* case and in many other cases, sufficiently appears, we think, from the petition (pp. 11-12, *supra.*). But it is made inescapably clear by the following comparison of the constitutional facts underlying the decision in the *Atkinson* case with the precisely opposite facts presented in the case at bar.

Both dead storage and storage of water for use during extreme low-water periods are necessary for the practical development of commercial water power. The facts hereinafter reviewed establish that in the *Atkinson* case the provision of dead storage and of storage for regulation of low-water flow was necessary and appropriate for providing flood-control and for improving navigation on the Red River, quite apart from the fact that such provision would also and necessarily result in the creation of water power.

The Red River flows through an arid or semi-arid region with sparse vegetation and loose soil for long distances in its upper reaches and thus creates a grave silting problem from the standpoint of navigation on its navigable reaches. The resulting silt deposits created obstructions to navigation and provision of any adequate navigation improvement either by open channel or slack-water methods required adequate provision for silt accumulation at the Denison Project.

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confused with the right of the United States to convert or manufacture raw water power or mechanical energy into electricity when and if the raw water power has been constitutionally created and has constitutionally become the property of the United States. The right so to convert is clear but arises only after the raw water power has been constitutionally created or acquired. The instant case involves the question whether the raw water power will be constitutionally created and acquired by respondent.

Thus, the Army Engineers stated: "Red River is a heavy carrier of silt" (Definite Project for Denison Dam and Reservoir—Red River, par. 25). "Its name is derived from the color of its waters which is due to its yellowish-red silt content" (H. D. 541, p. 45, par. 50). "The semi-arid region" of its reaches above the Denison project is "part of the great interior 'dust bowl region' ". (*Ibid.*, p. 45, par. 50.)

The Engineers reported that the annual silt accumulations in the Denison reservoir would amount to approximately 20,000 acre feet a year. On an estimated life of fifty years for the project, this required 1,020,000 acre feet of dead storage to accommodate the silt accumulations; and the volume of dead storage provided in the recommended plan had been measured and established, not by determining what would be necessary or useful for power development but, solely by determining the precise amount of space which would be required for silt accumulation in order to achieve the planned flood-control and navigation improvements. (Definite Project for Denison Dam and Reservoir—Red River, pars. 24-25.)

In contrast, the New and Kanawha Rivers, like the other tributaries of the Ohio, flow through a region of abundant rainfall and vegetation and there is no silting problem involved. Not only are the Engineering Reports in the instant case barren of any suggestion that dead storage is either needed or provided at the Bluestone site for silt accumulation or for any purpose other than the creation of head for water power, but the Army Engineers expressly state:

> "The silt content of the streams is small and causes no appreciable detriment to uses of the water for navigation, water supply or other purpose." (H. D. 91, p. 34, par. 37).

In H. D. 306, p. 179, the Army Engineers, after discussing the question as to whether there is any possibility of silting in flood-control reservoirs in the Ohio River basin, state:

> "337. * * * It is concluded, therefore, that *silting will not affect the usefulness of the flood-control reservoirs* proposed *in the Ohio Basin* to any appreciable extent during a 100-year period, representing the ordinary life of the structures.
>
> "338. * * * *no works to reduce the silt* contribution of the Ohio River to the Mississippi *will be worth while* and none is considered in this report."

The volume of dead storage at the Bluestone Project was therefore determined solely by the amount of power sought to be produced.

On the diagrammatic plate of the project attached to its reply brief in the District Court, the respondent accurately labeled this storage as "Dead Storage for Power Head" and made no pretense that it was intended or useful for any other purpose.*

With respect to the purpose and effect of the provision of storage for regulation of low-water flow, the contrast between the factual situation in the *Atkinson* case and in the instant case is equally sharp and complete. Any incidental increase in low-water flow resulting from the operation of the power project for power production at the Bluestone site is of no benefit to navigation. The Kanawha and Ohio Rivers are fully canalized streams. In an official report upon the *surplus* water available for water power during the next 50 years at the navigation dams on the Kanawha

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* Since the foregoing engineering reports were made, the Claytor Power Reservoir on New River near Radford, Virginia, has been completed. Thus, even if the question of silting had not been found by the Army Engineers to be of no consequence, that reservoir would obviously prevent any material silting downstream. (H. D. 306, p. 179, par. 337.)

River, the Corps of Engineers reserved only 250 cubic feet per second for *all* other uses, including navigation and domestic water supply. (Report of the Division Engineer, Upper Mississippi Valley Division, United States Army, February 24, 1932, par. 7.) The surplus over 250 c.f.s. has been leased by the Government for power development. In comparison, the natural extreme low-water flow on the Kanawha River is from 1000 to 1100 c.f.s. (H. D. 31, 73rd Cong., 1st Sess., p. 8, par. 2).

Any benefit to navigation from reduction of "flash floods", negligible as it is, accrues from the flood-control project included in the Bluestone Statutory Scheme and not from the power project. And, excepting any benefit which accrues to navigation from flood-control, the Army Engineers have reported that no benefit whatever will accrue to navigation from the execution of the Bluestone Statutory Scheme. (H. D. 306, p. 80, Table 19; p. 94, Table 27; p. 183, Table 53.)

While the Kanawha and Ohio Rivers are fully canalized streams, with abundant water supply at all times for every need of navigation, the situation in the *Atkinson* case was the precise antithesis. Navigation on the Red River is in open channel and the channel "is unstable due to its silty bed and difficult to maintain". (H. D. 541, p. 67, par. 73.) The low-water flow of the Red River is inadequate for purposes of navigation, and low-water regulation is required "to furnish a dependable navigation improvement". (*Ibid.*, p. 67, par. 72.) The engineering report in the *Atkinson* case repeatedly stressed that the proposed project would provide "a dependable low-water flow" which "would be of distinct benefit to the small commerce now developed upon those reaches of the lower Red River which are included in approved navigation projects". (*Ibid.*, pp. 79-80, par. 4; see also p. 67, par. 72.)

In the instant case the engineering reports establish, and it is not denied, that the provision of dead storage and power storage to create the water power at the Bluestone site *cut the annual flood benefits in half or from $740,000 to $370,000 annually* (pp. 2-3, *supra*). Manifestly, the power project in the Bluestone Statutory Scheme is not in aid of, but in direct conflict with and included at the expense of, flood-control. Plainly in the Bluestone Statutory Scheme there is no constitutional relation between the power project and the flood-control project.

The foregoing constitutional facts would in any event necessarily underlie and delimit the decision in the *Atkinson* case, but that they are the controlling factual bases of the decision is made inescapably clear both by the text of the opinion and by the copious footnote references to the engineering reports setting forth such facts (*Atkinson* opinion, L. Ed., l. c. 985, 986, 988, 989, 990, 991).

Without going into further detail, we summarize some of the controlling differences between the constitutional facts in the *Atkinson* case and in the case at bar:

The dead storage in the *Atkinson* case was necessary to provide space for silt accumulation in order to accomplish the designed flood-control and navigation benefits; and the amount of dead storage provided was measured and determined not by the needs of power development, but by the amount of space required for silt accumulation. (Definite project for Dennison Dam and Reservoir—Red River, pars. 24-25; H. D. 541, 75th Cong., 3rd Sess., p. 45, par. 50; p. 67, par. 73; *Atkinson* opinion, L. Ed. Report, l. c. 990.) *Here* (*i. e.*, in the instant case), there is no silting problem and dead storage is neither needed nor provided for silt accumulations but solely to create head for power (pp. 6-7, *supra;* H. D. 91, p. 34, par. 37; pp. 100-1, par. 14;

H. D. 306, p. 179, pars. 337-8). In the *Atkinson* case, dead storage was in aid of flood-control and navigation. *Here*, it is in aid of neither and is provided at the expense of flood-control.

In the *Atkinson* case, storage for regulation of low-water flow was necessary for the benefit of navigation (H. D. 541, p. 67, pars. 72, 73; pp. 79-80, par. 4; Opinion, L. Ed., l. c. 985, 986, 989). *Here*, storage for regulation of low-water flow is not needed or provided for navigation, but is needed and provided solely for the creation of water power (H. D. 306, p. 80, Table 19; p. 94, Table 27; p. 183, Table 53).

Whereas the provision of dead storage and storage for low-water regulation were both in aid of navigation and flood-control in the *Atkinson* case, *here* the dead storage and power storage are of no benefit to navigation or flood control, and instead reduce the flood benefits by one-half or from $740,000 to $370,000 annually (pp. 2-3, *supra*). Of course, the dead storage could in any event contribute nothing to low-water flow.

Whereas in the *Atkinson* case it was planned to draw down the storage for low-water regulation in advance of floods (Opinion, L. Ed., l. c. 990), *here* it is not planned so to do. On the contrary, except on prediction of a large flood, it is even proposed to encroach to some extent upon the flood storage for power purposes (H. D. 91, p. 115, pars. 62, 63).*

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* Even if such were not the plan of the official report and it were attempted to manipulate the power-storage so as to offset to a minor extent the great damage inflicted upon flood-control by the utilization of the major part of the Bluestone site for the power project, there would remain the barrier that flood-control and hydro-electric development in the Appalachian region are in fundamental and irreconcilable conflict. The same part of the same site cannot be used for both. In short, the power-storage at the Bluestone site cannot be available for replenishing the natural low water flow for the purpose of generating electric power in the summer

In the *Atkinson* case, the project would "fully control the maximum flood of record" (Opinion, L. Ed., l. c. 991; Definite Project for Dennison Dam and Reservoir, par. 14), and there was no indication that the project, basically one for flood-control, would have been projected but for flood-control (Opinion, L. Ed., l. c. 988). *Here* one-half the flood benefits have been sacrificed to the creation of the power project and the small flood-control project included in the scheme is obviously inadequate to control the maximum flood of record.

In the *Atkinson* case, the conflict between flood control and power development was "more apparent than real" (Opinion, L. Ed., l. c. 990). *Here* the conflict is complete and reduces flood benefits by one-half.*

When a statutory scheme includes two projects, of which only *one* is directed to the performance of a constitutional function, or when a structure purportedly authorized to

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and autumn months and at the same time be empty to receive and control floods like those of July, 1916, August, 1940, September, 1878, etc. Indeed, the records show that on New River floods may be expected at any time during any season of the year (H. D. 91, pp. 63-66).

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* In the court below, respondent, in support of a contention that power development and flood control are not conflicting at the Bluestone site, cited the excerpt from the report of the National Resources Committee which is quoted in footnote 56 of the *Atkinson* opinion. The report correctly states that "with respect to a particular reservoir" conflict would arise if it were attempted to use the same storage for both power development and flood control. When the report states that power and flood control may be reconciled by constructing separate reservoirs for each on the same stream or by providing separate storage space for each at the same site, that does not mean that the two uses are not in conflict, but merely that some of the available storage sites or storage space may be allotted to each—either because all of the available storage sites or space on a particular stream are not needed for flood control, or because Congress deems their use for non-federal purposes, such as power development or agriculture, more valuable and beneficial to the public.

serve a constitutional purpose is *enlarged,* not in order to forward the constitutional objective, but *to create water power which would not otherwise be created,* or when a part of a structure is to be devoted to the creation of water power *at the expense of the constitutional objective,* then the creation of that water power is *not* the *incidental* result of the performance of the constitutional function but instead is in excess of the constitutional authority of the Federal Government.

In the light of the foregoing, the lower court plainly erred in holding that the *Atkinson* case sustains the authority of the respondent to provide dead storage and power storage where, as in the instant case, such provisions are not in furtherance, but at the expense, of the accomplishment of any constitutional function and serve only to create water power for sale to the public. The decision of the lower court on this point is, we submit, plainly in conflict with the decisions of this Court in the *Atkinson* case and in the other cases cited at page 11, *supra;* but if not, then this is plainly an important question of federal law which has not been, but should be, decided by this Court.

Where, as was true in the *Atkinson* case, water power is created incidentally in the provision of facilities necessary for the accomplishment of a constitutional function, it is, of course, no constitutional objection that profits from sale of the water power may help to defray the cost of the project or otherwise enrich the Government. But, the converse is not true. The fact that the construction and operation of a power project might be profitable to the Government supplies no constitutional authority for undertaking the project.

Conclusion.

The other grounds relied upon for issuance of the writ are, we think, sufficiently clear upon the face of the petition so that further discussion in the supporting brief is unnecessary. For the reasons stated in the petition and in this supporting brief, the petition should be granted.

Respectfully Submitted,

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Dated: October 6, 1941.